IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
COMMERCIAL COURT

98/5095/3, 98/5603/3, 98/5604/3
98/5605/3, 98/5606/3, 98/5607/3
98/5608/3, 98/5609/3, 98/5611/3
98/5612/3, 98/5613/3, 98/6167/3
98/6120/3

Royal Courts of Justice
Strand
London W2A 2LL
Friday, 31st July 1998

B e f o r e
LORD JUSTICE HOBHOUSE
LORD JUSTICE PILL
LORD JUSTICE JUDGE

SOCIETY OF LLOYD'S — Respondent
v.
FRASER & ORS — Applicants

(Transcript of the Handed-Down Judgment of
Smith Bernal Reporting Limited, 180 Fleet Street
London EC4A 2HD
Tel: 0171 421 4040
Official Shorthand Writers to the Court)

MR A GRABINER QC, MR R JACOBS QC and MR D FOXTON (instructed by Messrs Dibb Lupton Alsop) appeared on behalf of the Respondent.
MR S GOLDBLATT QC and MR V NELSON (instructed by Messrs Epstein Grower & Michael Freeman) appeared on behalf of the Applicants in cases 98/5095/3 and 98/5603/3.
MR M WOOD solicitor advocate (instructed by Messrs Charles Russell) appeared on behalf of the Applicants in case 98/5605/3.
MR A LENCZNER QC (instructed by messrs Warner Cranston) appeared on behalf of the Applicants in case 98/5613/3.
Applicants in Person: Mr F Wakefield, Mr A Wakefield, Mr O Vaudry, Mrs A Strong, Mr S Butler and Mr C Thomas-Everard.

J U D G M E N T
(As approved by the Court)

HOBHOUSE LJ:

I. INTRODUCTION

A. THESE PROCEEDINGS

In March of this year Tuckey J sitting in the Commercial Court directed that judgments be entered under Order 14 against a large number of individuals. The Plaintiff in all the relevant actions in whose favour the judgments were entered were the Society of Lloyd's. The various Defendants were underwriting Names who had not accepted the settlement offered to them in August 1996. The judgments were for various liquidated sums and interest which the Society claimed were payable by the individual Names under the reinsurance and run-off contract dated 3rd September 1996. The sums of money involved are in the aggregate very substantial and of very considerable concern to many of the individual Names who say that they will be unable to satisfy the judgments which have been entered against them. The extent to which this is correct has not been investigated but it must be assumed that in respect of at least some of the Names this is the position. Similarly it must be accepted that it is of importance to the Society that it should recover the sums which it says are owing to it.

The Society started to send out letters before action to non-accepting Names in October 1996 and in the same month started to issue writs against them individually. This process continued until the following summer and some individual Names did not have writs served upon them until after July 1997. Thus it was that although by the latter part of 1996 there were well established proceedings against a large number of non-accepting Names which claimed sums said to be due under the reinsurance contract, not all the individuals with whom we are now concerned and against whom O.14 judgments have now been entered were parties to any litigation at that stage although they no doubt appreciated that, failing their reaching some acceptable agreement with the Society, they too would be sued.

This feature has given rise to one of the difficulties which we have had to consider. In November 1996, Colman J sitting in the Commercial Court gave directions for the marshalling of the actions and the determining of certain issues under RSC Order 14A. The purpose of this exercise was to identify what arguments it was contended by the various Defendants would amount to defences to the claims of the Society and to determine whether they had legal validity. He also gave certain directions concerning the pending O.14 proceedings which by then had been started. In a series of subsequent judgments he determined certain points under Order 14A. These determinations are contained in the Orders of 20th February and 24th April 1997. These Orders were appealed by certain of the Names to the Court of Appeal. On 31st July 1997 the Court of Appeal dismissed those appeals.

These points having been determined, it was necessary for the Commercial Judge to consider further the O.14 summonses which had been issued both in the actions started in 1996 and those started subsequently. Tuckey J took charge of the litigation and gave various directions in October and December 1997 in order to enable all the arguments which the various Defendants were raising in answer to the applications for O.14 judgment against them to be considered. So far as any question of liability was concerned it appeared that there were two arguments which needed a further decision or ruling from the Court. One was the "bad faith" argument and the other was the "securities legislation" point. He gave directions for the purpose of ascertaining which of the Defendants wished to raise either of these points and for hearings at which they could be considered. The bad faith argument raised a subsidiary question whether it was an abuse of process for the Defendants to raise it in view of the hearings and determinations which had taken place before Colman J and the Court of Appeal in 1996/7. The Society submitted that it was an abuse and that none of the Defendants should be allowed now to raise it. By a judgment delivered on 3rd December 1997, Tuckey J ruled in favour of the Society, holding that it did amount to an abuse of process. He refused leave to appeal. Certain of the Defendants have applied to this Court for leave to appeal against that order. They, and other Defendants, also contend that the December Order was wrong on their applications for leave to appeal

against the subsequent O.14 judgments: they submit that they were entitled to raise this argument and that it provides them with an arguable defence to the claims of the Society, which, of course, is ultimately the relevant question.

The securities legislation argument was a freestanding point which only affected overseas Names and, as had throughout been acknowledged, had not been considered or covered by the various decisions in 1997. In a judgment dated 27th January 1998 Tuckey J considered the relevant Defendants' arguments under this head and held that they did not provide a defence to the claims. He again refused leave to appeal and his decision is among those challenged by the relevant Names on their application for leave to appeal against the subsequent O.14 judgments entered against them.

There is a third argument which certain of the Defendants seek to raise as providing them with a defence to the claims made by the Society. This defence is said to arise under the first and third Non-Life Insurance Directives of the EEC and the Insurance Companies Act 1982. This argument had not been raised before Tuckey J until the final stages of his involvement in March of this year. He did not give a formal judgment upon it. It was left as a point to be raised on the applications to this Court for leave to appeal from the O.14 judgments should any relevant Defendant be minded to do so. It has been relied upon specifically by six Names represented by the firm James Barnett.

It was also necessary for Tuckey J to consider certain arguments upon the quantum of the judgments to which the Society was entitled. These raised certain questions of the construction of the provisions of the reinsurance contract. They also raised questions of the effect of the conclusive evidence clause (clause 5.10) in the reinsurance contract. Tuckey J considered these arguments in judgments which he delivered on 27th January and 4th March 1998.

The upshot was that Tuckey J held that the Society was entitled to O.14 judgments effectively as asked. He refused leave to appeal. He also refused any stays of execution save for the purpose of applying to this Court for leave to appeal.

One of the Defendants who had been sued was a Mr Thomas-Everard who had originally been represented by the firm Epstein Grower & Michael Freeman but was by the latter part of 1997 acting in person. Tuckey J recused himself on personal grounds from dealing with the case of Mr Thomas-Everard. That Defendant's case was therefore dealt with by Colman J who, having considered the affidavit evidence relied upon by Mr Thomas-Everard and his oral and written submissions, decided that there was no reason why O.14 judgment should not be entered against him as well. He gave his judgment on 20th March and adjourned the matter so that the parties could either agree or make a further application about the actual terms of the judgment. In the event, there was a further hearing before Colman J on 7th May and it was on that date that his formal order was made. He considered that Mr Thomas-Everard should in any event pay forthwith the costs of that additional hearing which he assessed at £750. He refused leave to appeal and granted a stay of execution pending the application to the Court of Appeal for leave to appeal but he specifically excluded from that stay the £750 costs order which he had directed should be paid forthwith by Mr Thomas-Everard.

Applications for leave to appeal have been made by virtually all the affected Defendants to this Court. This Court has directed that all these applications be listed together on an *inter partes* basis and has heard full argument upon them. We have heard argument from counsel for the represented parties and from counsel for the Society. We have also heard and received oral and written submissions from the unrepresented parties. One of the applicants acting in person (Mrs Strong) requested that she be excused from a personal attendance before the Court; her request was acceded to and the Court considered her application on the basis of the full documentary material which she had provided.

Another unrepresented party, Mr Vaudrey, addressed us in person and also made submissions in writing. He requested permission to instruct an unqualified advocate to address the Court on his behalf; the Court did not accede to that request. However it is apparent that the written submissions include all that could properly have been said on his behalf by such an advocate and that the gentleman in question did provide Mr Vaudrey with the appropriate assistance.

We have conducted this hearing taking the points raised, topic by topic. In evaluating the applications we have made use of the draft Notices of Appeal of each Applicant; we have also taken into account any applications to adduce new evidence that we understand would be made and any respondent's notice that might be served. Any party who wished to address us on any topic has had the opportunity to do so either orally or in writing and Mr Thomas-Everard in particular has taken full advantage of this opportunity. The main burden of presenting the legal arguments has of course fallen upon the legal representatives and the litigants in person have been able to adopt their submissions. Owing to the number of points raised, the volume of the documentary material which has been placed before us and the number of parties whom we have had to hear, the hearing has taken a full working week. It was not appropriate or feasible for us to give our decision on the various points during the hearing and the judgment which we are now delivering deal, as did the hearing, with the various points on a topic by topic basis.

The parties (represented and unrepresented) on whose behalf the applications have been made will be scheduled to the Orders of the Court.

B. THE PROBLEMS AT LLOYD'S AND THE ENSUING LITIGATION

The problems encountered in the Lloyd's insurance market between 1980 and 1990 and the ensuing litigation have been well catalogued and have been set out in a number of earlier judgments. There is no need to repeat them in detail here; a summary will suffice. By the early part of the 1980s it had become apparent and it was acknowledged that there was an under-capacity of the market. An important consideration was the exposure of the market to claims arising out of the practices of the asbestos industry in the United States many years before. During the 1980s a considerable number of new Names were recruited and became underwriting members of Lloyd's. Thereafter many of them and many Names who had been underwriting members of Lloyd's from earlier dates suffered very

serious losses. There were a number of causes contributing to this situation. One was the under-estimation of the size of the losses which would be coming into the market. Another was a succession of bad years for excess of loss underwriters. A further cause was bad practices which had grown up among the professionals operating in the market, among them particularly the members' agents and managing agents, which did not have regard to the duties of those professionals to their principals, the Names. When business which had previously been profitable became unprofitable questionable short-term and other devices were adopted in an attempt to preserve the former profitability or at least postpone its passing. When Names discovered that they were suffering severe losses contrary to what they had been led to expect they looked around in order to try and find out how this had come about and who were responsible for that situation.

Groups of Names formed action groups which brought and prosecuted proceedings against those they believed had broken their contractual and common law duty towards them. The various categories of case which were brought have been listed by Cresswell J in his statement of 29th September 1994. These actions were largely successful and resulted in judgments in favour of the Names. The extent to which actual recoveries were effected pursuant to these judgments was in some cases problematic. Various agreements were entered into and there was further litigation involving the Society itself as to the extent to which Names were obliged to credit these recoveries to their individual premium trust funds.

By at the latest 1991 or 1992, it had also been appreciated that claims similar to those which had been made against members' agents or managing agents or auditors might be made against the Society itself. In 1993 a counterclaim was made against the Society by a Name, Mr Mason. His allegations included allegations of fraud directed in particular to the recruitment of additional Names in the 1980s and the reinsurance of asbestosis and other long tail risks. It appears that a similar action may have been started by a Name in Canada in 1992. In any event the position had been reached by 1993 that Names were aware of the potential for bringing actions not only against those who had been

acting for them and supposedly looking after their interests in the market but also as against the Society itself. It was appreciated that the allegations which could be made included allegations of fraud for which it was said the Society was responsible and more general allegations of mismanagement. It has been up to Names individually or in combination to decide upon the extent to which they wished to join in making such allegations against the Society and to take or progress proceedings in their own name against the Society. It would appear that most of them have chosen not to take such proceedings.

Before us certain of the litigants in person have sought to stress the strength of their case in fraud against the Society. They have included in the documentary material they have placed before us documents which support their allegations of fraud or other misconduct or misfeasance on the part of the Society in the years up to 1985 or 1986. Such material has also been relied upon in support of the allegation that there was a failure to comply with the requirements of the first EEC Directive.

It must be clearly stated that for the purposes of these O.14 proceedings it has throughout been assumed that there are arguable allegations of fraud and misfeasance that can be made against the Society (subject now only to the question of limitation of actions having regard to the passage of time since these matters became known). The Society of course strongly disputes these allegations and is defending the action which is being prosecuted by Sir William Jaffray Bt against the Society. The present applications do not raise any question concerning the merits or demerits of such claims against the Society. Individual Names, given that they believe that they have been the victims of fraudulent practices, feel a strong sense of injustice and are seeking to resist the claims of the Society against them by any means which are available to them. They also have a very strong financial incentive to do so. But the question with which these O.14 proceedings are concerned is whether or not they have any ground for disputing their liability under the reinsurance contract. One of the clauses which is and has been in the 1997 hearings central to this question is clause 5.5. of the reinsurance contract which provides:

"Each Name shall be obliged to and shall pay his Name's Premium in all respects free and clear from any set off, counterclaim or other deduction on any account whatsoever including in each case, without prejudice to the generality of the foregoing, in respect of any claim against [Equitas], the Substitute Agent, any Managing Agent, his Member's Agent, Lloyd's or any other person whatsoever ..."

C. THE RECONSTRUCTION SCHEME

By 1991 or 1992 it had become clear that the market was in a state of crisis. There was a risk that the claims which would be made upon Names, or were outstanding, were liable to overwhelm the resources of some of them. The reinsurance structures within the market were themselves unlikely to be able fully to protect Names against their liabilities. Syndicates were finding it impossible to close certain years; reinsurance to close was impractical or unavailable. This serious situation had substantially come about because of one or more of the various matters to which we have previously referred. But whatever their causes, the difficulties for the market and all those involved in it required to be addressed and the Society had of necessity to look for solutions and seek to provide remedies - the 'R & R' scheme. The measures adopted involved the Society using its Bye-Law making powers. It effectively introduced a compulsory reinsurance and run-off scheme. It was put to the members of the Society in July 1996. An extremely lengthy and complex offer document was published. Those who signified their assent to and willingness to co-operate with the proposals had the advantage of various financial arrangements which, whilst not affecting their ultimate liability, facilitated their discharge of it.

Those who did not accept the proposal, the non-accepting Names, were nevertheless required to run-off their outstanding liabilities in accordance with the reconstruction scheme and reinsure them as provided for in the "Equitas" reinsurance contract which was an essential part of the scheme. This contract provided a method whereby a single legal entity of assured ability and willingness to discharge the insurance liabilities of Names to those who had placed insurances in the Lloyd's market from outside (as well as from inside the market) could do so in an orderly and assured fashion. Part of this reinsurance scheme, which was effectively a reinsurance to close, required the individual Names to pay a reinsurance premium to Equitas which corresponded to an assessment of each Name's outstanding liabilities, accrued and future, down to the end of 1992. The contract, or related contracts had also to make provision for the orderly application of the assets of the individual Names within the market, including their assets held by or formerly held by their managing agents, their existing reinsurance contracts, their various trust funds and deposits and the litigation funds which had resulted from the successful litigation of groups of Names against those who had culpably not discharged their duty of safeguarding the interests of Names. It was in the treatment of such assets that the settlement

document primarily distinguished between those who accepted the scheme and those who did not.

The decision of individual Names whether or not to accept the scheme had to be made by September 1996. About 85% of Names gave an unequivocal acceptance. About 8% gave a clear rejection. The remaining 7%, or thereabouts, purported to accept the scheme with qualifications. Their status has been the subject of a further decision of the Commercial Court: See Manning v Lloyd's [1997] Lloyd's IR 186. The Society seems nevertheless still to refer to 93% or 94% acceptances, which some of those appearing before us have indignantly rejected as unwarranted. Nothing turns upon the categorisation of the 7% or the percentage of actual acceptances. It was not a term of the R&R scheme that there must be a certain percentage of acceptances. As we understand it the Names with whom we are concerned in the present proceedings are all drawn from the 8% or so of non-accepting Names.

D. THE CLAIMS AGAINST THE NON-ACCEPTING NAMES

The writs and Points of Claim which the Society has issued follow a standard form. The plaintiff is the Society. It sues as the legal assignee of Equitas, (strictly Equitas Reinsurance Limited). The defendants are either a non-accepting Name sued individually or lists of non-accepting Names.

The pleaded cause of action involves a number of allegations or steps.

(1) "Lloyd's has at all times had power pursuant to the Lloyd's' Acts 1871-1982 and in particular sections 6 and 16 and schedule 2 of the Lloyd's' Act 1982 to make such Bye-Laws as from time to time seem requisite or expedient to the Council of Lloyd's ("the Council") for the proper and better execution of the Lloyd's' Acts 1871-1982; for the furtherance of the objects of Lloyd's; and such Bye-Laws as the Council thinks fit for any or all of the purposes specified in Schedule 2 of the Lloyd's Act 1982."

(2) When the defendant was elected an underwriting member he signed an undertaking in which he expressly agreed that he would be bound by the provisions of the Lloyd's' Acts and Bye-Laws made thereunder and any directions given or provision requirement made by or on behalf of the Council.

(3) By various Bye-Laws and resolutions and directions made under them the Society -

(a) appointed a substitute agent to act as the managing agent for the Name in respect of the syndicates of which he was a member up to and including 1992 and in respect of the assets cash and other items in respect of those syndicates, and

(b) directed the substitute agent in general terms to implement on behalf of the Name the

reconstruction and renewal proposals and in particular "directed the substitute agent to execute the reinsurance contract for itself and on behalf of the members, including the defendant, in such form as the Council may direct".

(4) By a resolution the Council directed the substitute agent to sign on 3rd September 1996 the reinsurance contract in the form directed by the Council on behalf of the Name.

(5) By that reinsurance contract the Name was required to pay the reinsurance premium provided for in clause 5 of the contract to Equitas.

(6) The right to be paid the premium was assigned by Equitas to the Society on 2nd October 1996 (as was anticipated in the offer documents).

(7) In breach of contract and/or in breach of the Bye-Laws, the Name has failed to pay the reinsurance premium to the Society.

The claim in each action was for the payment of the premium together with interest calculated in accordance with clause 5.3 of the reinsurance contract.

The Names sought to attack each of these steps. They contended that they were entitled to rescind their original contracts of membership with the Society on the grounds that they were induced to enter into them by fraud or misrepresentation for which the Society was responsible. This response raised the allegations of fraud to which we have already referred but sought to make use of them not for the purpose of a cross-claim in damages but as a ground for rescission. They next challenged the validity of the Bye-Laws and the various resolutions relied upon. These were essentially *ultra vires* arguments based upon the submission that they went outside the purposes for which the Society was empowered to make bye-laws or pass resolutions either on the true construction of those powers or because they were implicitly outside those powers since they were directed to, so it was alleged, relieving the Society from liability for fraud or at the least assisting the Society to protect itself against or, in practical terms, avoid liability for fraud. Lastly they attacked the effect of the reinsurance contract itself basically on arguments of construction and public policy (again referring to their fraud allegations). The primary point of attack was upon clause 5.5 and the provision which required that the reinsurance premium be paid without set off. It was argued that because allegations of fraud were being made against the Society it would not be right to construe the no set off clause as applying to such matters or it would be contrary to public policy because it would be tantamount to allowing someone to escape from liability for their fraud or would have that effect and therefore should not be regarded as enforceable.

E. THE LITIGATION 1996/7

Colman J:

At the time the actions were first started by the Society against Names in the latter part of 1996, the Judge of the Commercial Court assigned to take charge of this litigation was Colman J. Between November and the following April he held a series of hearings at which he gave directions for the marshalling of the actions and the determination in an orderly fashion of the points which had been raised. The Society had issued O.14 summonses at an early stage after the service of Points of Claim. It was apparent to Colman J that before those O.14 summonses could be determined there were a number of points of law which needed to be determined under O.14A. Points of Defence were not served at that stage and time was extended generally. The relevant points which required to be dealt with were raised on affidavit or orally at the directions hearings. The result of this was that there were a number of Names or groups of Names who were taking an active part in raising for his decision various proposed defences to the claims of the Society and were assuming the task of arguing them before the Court. The remainder of the Names did not at that stage need to do anything except wait and see what the outcome was. If it was favourable and the active Names had succeeded in establishing some arguable defence or defences that would serve to show that such defences were also available in principle to other Names. The intention at that time was certainly that the various hearings should determine in a manner which would cover all Names whether there were any triable defences to the claims being made by the Society (other than points of quantum affecting individual Names).

The various orders drawn up in each case identified the action or actions in which they were made and, where they were expressly to apply also to other actions, the order made that clear, as for example did the Order of 15th November 1996 which referred comprehensively to identified Epstein Grower and Michael Freeman Names, Names resident in Canada who had instructed Warner Cranston, and the defendants in various other actions identified either in the body of the Order or the Schedule to it. He further, by way of example, specifically gave leave to the Warner Cranston Names to take part in other actions as interveners.

Insofar as allegations of fraud were being made by Names against the Society, he directed that any "fraud issues" should be dealt with at separate hearings within the scheme of the disposal of the O.14 summonses. He directed the filing of further affidavits by the defendants who wished to raise such issues and laid down a timetable and he further directed that solicitors, apparently representing any Name being sued in an Equitas premium action, should co-operate in an attempt to categorise those Names who sought to rely upon a defence of fraud and isolate a limited number of Names to represent that category. A point which influenced the thinking at this time was that it might be

necessary for each individual Name relying on this point to make out an arguable case that he (or she) had been misled and/or had relied upon the relevant representation; as we will explain, the fraud point was later dealt with on a basis that made it unnecessary to distinguish between individual names.

By the following March, Colman J had decided a number of points under O.14A. He made declarations that

"1. Subject only to the determination of the Defendants' allegation that they were not Names of Lloyd's at the relevant time or in any relevant context, the Defendants are bound by the terms of the Reinsurance and Run-Off Contract dated 3rd September 1996 ("the reinsurance contract").

2. The following byelaw and decisions of the Plaintiff were intra vires the Plaintiff and cannot be impugned by the Defendants if they were Names at Lloyd's at any relevant time:

   (i) the Reconstruction and Renewal Byelaw (No.22 of 1995):

   (ii) the Resolution and Direction of the Council of Lloyd's made pursuant to the Reconstruction and Renewal Byelaw and the Substitute Agent's Byelaw and effective on 3 September 1996.

3. None of the following contentions or allegations enable the Defendants to contend that, if they were Names at Lloyd's at any relevant time, they are not bound by the terms of the reinsurance contract:

   (1) The purported termination by the Defendants of their managing agent's authority;

   (2) The allegation that the execution of the reinsurance contract was outside the scope of the powers given by the Defendants to their managing agents;

   (3) The allegation that the reinsurance contract contains terms which are against the Defendant's interest and in favour of Lloyd's, Equitas or other Lloyd's related entities;

   (4) The alleged conflict of interest between the interests of the Defendant and Lloyd's, including the allegations that:

      (i) such conflict of interest renders the Reconstruction and Renewal Byelaw unreasonable in law and ultra vires, and

      (ii) the reinsurance contract is voidable by the Defendants by reason of an alleged conflict between the interests of the Defendants and Lloyd's, and AUA 9's failure to consider the Defendants' personal position or the reasonableness of each and every term of the reinsurance contract in the context of the Defendants' best interests as opposed to those of Lloyd's:

   (5) The allegation that the appointment of AUA 9 as substitute managing agent was ultra vires Lloyd's;

   (6) The allegation that the Reconstruction and Renewal Byelaw was unreasonable in law and ultra vires:

   (7) The allegation that the Resolution and Direction made by the Council of Lloyd's and set out in Schedule 3 to the Points of Claim was unreasonable in law and ultra vires;

   (8) The allegation that Lloyd's had no title to sue, by reason of an ineffective notice of assignment, including the allegation that AUA 9 had no valid authority to receive notice of assignment."

On 20th February he had given a reasoned judgment in which he had by way of introduction categorised the submitted arguable defences under three heads -

(1) Defences based on the submission that the Names did not accept R&R and therefore cannot as a matter of law be bound by the payment provisions which form part of it;

(2) The Society's title to sue in respect of monies payable under R&R:

(3) Defences based on the allegation that Names were induced by fraud on the part of the Society or those for whom it was responsible to become underwriting Names and that the Society cannot therefore now recover amounts which would otherwise be due.

He also referred to a further submitted defence under Article 85 of the Treaty of Rome which was not yet ready for argument and to the fact that Names resident in Canada were seeking to rely upon certain defences based upon Canadian securities legislation. He did not at that hearing deal with the "fraud defences" and deferred them to a later hearing. He said that:

> "If the group one and two defences are held in these proceedings not to amount to arguable defences and it therefore becomes necessary to determine whether the group three fraud defences are arguable, it may be that the determination of this court on those defences will also be determinative of that issue should it arise in the proceedings against other Names."

The considered judgment which he delivered on 20th February 1997 runs to some 59 pages and dealt with the issues which were relevant to the declarations which we have set out above.

On 21st March he gave directions for the determination of what he understood to be the outstanding issues of law arising from the fraud allegations for which purpose factual assumptions of the existence of actionable fraud on the part of the Society or those for whom it was responsible were made. There were three headings -

1. Would Names arguably be entitled to rescind their membership of Lloyd's;

2. Whether clause 5.5 provided an answer to cross-claims or the assertion of set-offs and counterclaims arising from any such fraud in answer to the Society's claims in the actions;

3. Whether clause 5.5 provided an answer to cross-claims or set-offs based upon the matters deposed to by Mr Freeman in paragraph 8 of his third affidavit.

After a further hearing, Colman J, in April, delivered a further reasoned judgment covering the fraud issues which the parties before him had raised and declared that:

"1. The Defendant is unable to rescind his membership of Lloyd's

2. Clause 5.5 of the reinsurance and run-off contract precludes the Defendant from (i) advancing the cross claim set offs and counterclaims referred to in his affidavit as a defence to the Plaintiffs claim herein to recover the Name's Premium and (ii) relying upon such cross claims

and set offs or counterclaims in order to obtain a stay of execution pending the trial of such cross claims set off or counterclaim."

The Defendant referred to was a non-accepting Name, Mr Wilkinson represented by Epstein Grower & Michael Freeman. He was not formally a representative defendant but the decision in his case was treated as the decision of a test case.

The Court of Appeal:

The Names represented by Epstein Grower & Michael Freeman and Warner Cranston appealed against the judgments which Colman J had given on 20th February and 24th April 1997. The appeals were dismissed and his judgments affirmed. The Court of Appeal handed down its written judgment (running to thirty pages) on 31st July 1997. In the Court of Appeal the Appellants mounted three challenges each of which they contended provided an independent defence to the Society's claim. The first was an *ultra vires* argument that the byelaws and resolutions exceeded the scope of the powers available to the Council. The second was that, by reason of the fraudulent misrepresentations which had induced Names to become underwriting Names and sign the undertakings relied upon by the Society, the Names were entitled to avoid what would otherwise have been their contractual obligations and that they accordingly were not bound by the various byelaws, resolutions or directions or the things purportedly done on their behalf by the substitute agents. The third was that each defendant was entitled, notwithstanding clause 5.5, to set-off in extinction of the Society's claim an equal and opposite counterclaim. The Names also submitted that they ought, in any event, not-withstanding clause 5.5 to have a stay of execution in respect of any judgment entered against them until their cross-claims for fraud against the Society had been determined. The judgment of the Court of Appeal was that all these arguments should be rejected.

It was a recurrent theme of the case of the Appellants that there had been fraud for which the Society was responsible. Furthermore, it was assumed that such fraud had caused the Appellants' loss and had induced them to act to their detriment. It was common ground that, before the relevant powers were exercised by the Society and the R&R scheme promulgated, it was known that such allegations of fraud were being made against (among others) the Society. The decision of the Court of Appeal was that notwithstanding the existence of such known allegations of fraud (which were assumed for the purposes of the appeal to have substance and be liable to give rights of recovery by Names against the Society) the various Bye-Laws, resolutions etc were within the powers of the Society and its Council, the Names were bound by the undertakings which they had given, clause 5.5 should be construed and enforced by the Court so as to exclude any reliance by the Names upon such

fraud as a defence to the claim for the reinsurance premium, and the contractual provision for no stay of execution should be respected and enforced notwithstanding such fraud. Indeed, the Court of Appeal referred to the fact that the allegations of fraud were already known before the implementation of the R&R scheme as supporting their conclusion rather than providing an objection to it. (See for example pages 22-29 of the transcript.) At p.20, having cited Coca-Cola v Finstat [1998] QB 43, they observed that clause 5.5 "does not purport to exclude or limit liability for claims of the Names". At p.23, they observed:

> "We would re-emphasise that the clause does not seek to exclude or limit liability for fraud. Its purpose ... is to insulate recovery of the premium from claims by those who owe the premium."

However it was a feature of the argument which was presented to the Court of Appeal on the main *ultra vires* aspect that that ground was only argued in the Court of Appeal on what was described as the 'mutuality' point. It was submitted that the R&R scheme introduced a principle of mutuality which was inconsistent with the whole basis upon which the Lloyd's market operated and the relevant powers were granted to the Society. During argument, Mr Goldblatt QC who appeared then as he does now on behalf of the Names represented by Epstein Grower & Michael Freeman sought to argue in support of his *ultra vires* argument an additional submission which Saville LJ summarised in the following way:

> "That the agreement we are now looking at was itself fraudulent [*sic*] and it was devised by Lloyd's as a fraudulent means to cover up or avoid the consequences of their own fraud."

The contract was the reinsurance contract containing clause 5.5. Mr Goldblatt also put the argument in this way:

> "I am saying that the way that this particular clause is drafted, and the purpose for which this particular clause is sought to be used, is in aid of the fraud and part of the fraud, and I say that because, if we assume that Lloyd's turns out to have been a fraudster, then at a time when, with knowledge of the allegations of fraud against you, they [inserted] a clause designed to protect themselves against the implications and consequences of the fraud, that cannot be held to have been done in good faith."

Mr Grabiner QC who then, as now, appeared for the Society had objected to this argument being advanced, firstly, because there was "absolutely no material to support that allegation" and it was not made to Colman J and, secondly, because it does not follow from the assumed fraud, the inducing of Names to enter into contracts in some cases more than a decade earlier. After further argument Saville LJ said:

"I can see the argument that, as a matter of construction, this clause cannot be read so as to, as you put it, protect Lloyd's from the consequences of an earlier fraud. You may be right, you may be wrong about that, and that seems to me to be two questions, one a question of construction on the agreement as between Equitas and the Names, and the other a question as to whether or not any different position is reached when you have this agreement between a party, Equitas, that is innocent, but which is then assigned to a party, Lloyd's, which we are assuming was fraudulent in the past. What, I am afraid to say, makes me personally restive - I follow that argument - is any suggestion that this agreement itself is tainted by bad faith. I follow your earlier argument [that Lloyd's] cannot take advantage of it because of [their] own taint of inducing people to get into or stay in Lloyd's. .... This seems to me to be getting very close to saying this agreement or this clause was drafted in bad faith, and that does to me at the moment seem to be not something that one could, in any sense, infer from the assumed facts, and I repeat, it does not seem to me to be something that was in any way suggested to Colman J."

"It just seems to me that it is not now open to you, at least on an appeal of this nature from Colman J, to advance a case based upon assuming, or seeking to ask the Court to infer, that Lloyd's were not just fraudulent in persuading Names to join or to remain members in the 1980s but were also fraudulent or acting in bad faith in seeing to it that this clause appeared in the Equitas contract."

The Court therefore ruled that it was not permissible for Mr Goldblatt "to advance an argument based on the proposition or premise that Lloyd's were in bad faith in introducing this clause in the sense that introducing it in the knowledge or belief that they had been fraudulent for the purpose of seeking to avoid the consequences of their fraud".

The result of this ruling was that the main *ultra vires* argument had to be presented in the Court of Appeal on the narrower basis of the 'mutuality' argument but so far as the other arguments were concerned, it does not seem to have affected in any way the breadth of the arguments presented. The inability of Names to escape their contractual undertakings, the enforceable and comprehensive character and application of clause 5.5, and the denial of the stay of execution on contractual grounds were all confirmed by the Court of Appeal. The adverse ruling was based upon two considerations. The Appellants had laid no factual basis for a separate fraud in 1994 and following years. Secondly, they had not as such raised the 'bad faith' argument as a defence before Colman J, although they had comprehensively argued ultra vires, public policy and construction points before him, and they should not be allowed to advance it for the first time on the appeal.

However, it is to be noted that a not dissimilar point came back into the picture when the Court

of Appeal was considering and rejecting the appeal on the stay of execution aspect. They listed and considered a number of points: whether the contractual provision should be given effect to; 'Assisting the Fraudster'; Lack of Vires; International Comity; and relative need and hardship. In relation to 'vires', the Court rejected the argument that, because the powers of the Society covered lawful acts, paying compensation for fraud would be outside the powers of the Society.

The outcome of the 1996/7 hearings before Colman J and the Court of Appeal was that it was intended and believed that they had determined all the issues of liability which the Names sought to raise in answer to the claim for the reinsurance premium save for the "securities legislation" point raised by certain overseas Names and, possibly, an EEC law point. Subject to those two exceptions, all the points on liability had been answered in favour of the Society. But one argument, the 'bad faith' argument, had been ruled inadmissible by the Court of Appeal on the two grounds to which we have referred. It was intended and believed that, again subject to the two exceptions, the only remaining points to be dealt with before the O.14 summonses could be concluded would be questions of quantum.

Tuckey J:

In September 1997 Tuckey J took over the supervision of the litigation. He held a further composite directions hearing in October 1997. His Order was dated 31st October and was stated to apply to all the defendants listed in the schedules to the relevant summonses with the exception of ten individual defendants listed in the second schedule to the Order none of whom are concerned in the present applications. Thus the Order covered the clients of Warner Cranston, Epstein Grower & Michael Freeman, James Barnett and Charles Russell and the Names represented by four other firms, with whom we are not presently concerned, and 7 litigants in person who included some of those now represented by James Barnett as well as Mr and Mrs Micklethwait and Mr Thomas-Everard. The order however recognised both expressly and implicitly that there were other defendants to whom the directions did not apply.

The directions given covered four topics. Firstly Tuckey J gave directions for the identification of those defendants who were seeking to rely upon the 'bad faith' argument. Epstein Grower & Michael Freeman were ordered to identify which of their clients, whether presently sued or not, had instructed them to raise that argument and any other defendant (not represented by Epstein Grower & Michael Freeman) was required to file an affidavit relying upon such an argument by 14th November. Any other of the defendants would be debarred from raising that argument. He then gave directions for the Society to state its case on affidavit why such argument involved an abuse of process and fixed

a hearing date for the decision of the abuse of process point.

The second topic dealt with was the Canadian Securities Legislation defence. He similarly gave directions for the identification of the defendants relying upon this defence, the exchange of evidence and the hearing date for the determination of the question whether it provided a defence to the claims of the Society against those defendants.

Thirdly he gave directions requiring any defendant who wished to raise any other defence (i.e. other than the 'bad faith' and Canadian Legislation points) to file appropriate affidavit evidence by 28th November and directed a hearing for the consideration whether any such proposed defences provided an answer to the O.14 summonses.

Finally he dealt with the question of stay of execution which, in view of the decision of the Court of Appeal in July was confined to circumstances relating to the personal hardship of individual defendants. He directed that the consideration of such arguments and the making of any stay orders should be assigned to Master Miller.

Abuse of process:

The abuse of process hearing took place as directed in the latter part of November and on 3rd December Tuckey J handed down a written judgment. This was a judgment which carefully considered the arguments advanced. The Order which he made was:

> "It is an abuse of the process of the Court for the defendants to seek to advance the allegation of "bad faith in relation to R&R" as referred to [in certain letters and an affidavit] and at paragraphs 100 and 101 of the Points of Defence and Counterclaim served on behalf of Sir William Jaffray Bt."

He refused leave to appeal. He identified the parties to whom his Order applied; they were those parties who had, pursuant to his October directions, been notified to the Court as seeking to rely upon the 'bad faith' argument. These were the defendants represented by Epstein Grower & Michael Freeman, Mr Fraser, and six litigants in person, Mr Catling, Mr and Mrs Micklethwait, Mr Pascoe, Mr Thomas-Everard and Mr Finlay.

The pleading referred to in the Order sets out the alleged defence arising from the 'bad faith' argument. It pleads and relies upon the Court of Appeal decision as to the actual, and intended, effect of clause 5.5 to require that any cross-claim in fraud against the Society be prosecuted separately and not be used as a set-off against the claim for premium. The pleading also pleads and relies upon the

knowledge in 1996 of the existing, and as yet undetermined, allegations of fraud that were being made against the Society but makes it clear that the allegations of fraud to which it is referring are those relating to "having induced Names to join or continue as members of Lloyd's by making fraudulent misrepresentations". The pleading then alleges that the dominant purpose and intention of the Society in connection with clause 5.5 so far as it related to the Society itself was to shield the Society from allegations of fraud and its consequences and disadvantage financially non-accepting Names. Such purpose and intention was, it is said, outside the objects and powers of Lloyd's. In this context it is alleged (in paragraphs 17.3 and 102) that certain members of the Council in the periods down to 1996 knew of the falsity of representations which had been made to Names in earlier years prior to 1988. These are therefore the same allegations of fraud as had earlier been relied upon in relation to the defences considered by Colman J and the Court of Appeal in 1996/7. They do not raise any new allegation of fraud. They only add, if they add anything at all, an allegation that certain members of the Council in 1996 knew that such allegations were at least in part true. But as it is alleged that these persons except for Mr Deeny and Mr Messer were parties to the original frauds, it therefore adds nothing to the earlier allegation as to their state of knowledge.

The conclusion that it is sought to draw from these allegations is set out in paragraph 18 of the pleading:

> "In and by reason of the foregoing, Lloyd's is not entitled to invoke clause 5.5 of the reinsurance contract to shield itself against allegations of fraud and the consequences of fraud. On the contrary, the deliberate incorporation into the reinsurance contract of a clause whose language was wide enough to produce that effect as a matter of construction was itself a continuance of and a part of the fraud of Lloyd's (as hereinafter pleaded) by which the defendant was induced to become a member of Lloyd's in the first place, and to continue as an underwriting member of Lloyd's in subsequent years."

Paragraph 100 pleads that the Society "as an institution" was faced with probable claims in fraud from Names from whom facts had been withheld and could not in law close its "institutional eyes" to certain matters. Six are listed. They relate to the situation which had arisen by the early 1980s of inadequate provision for anticipated heavy losses in relation to asbestos and pollution claims, and the fact that the reinsurance to close scheme had become incapable of equitable operation, that the recruiting of additional Names and the expansion of underwriting capacity had been consistently approved and encouraged by the Society throughout the 1980s and that a false rosy picture had been consistently presented to external Names from whom the true position had been concealed with the result that Names who had joined or increased their underwriting capacity during the 1980s had "unfairly inher-

ited" the long tail asbestos and pollution liabilities of earlier years. This again makes it clear that it is a reference back to and a reliance upon the events of the early and mid 1980's. Paragraph 101 of the pleading is similar to paragraph 18 which we have already quoted. It alleges that with the knowledge pleaded in paragraph 100 the Society "could not lawfully within its statutory or other powers include in a contract unilaterally imposed by Lloyd's on the Names (that is, the Equitas reinsurance contract), provisions whose sole or dominant purpose was the protection of Lloyd's from its own fraud and the consequences of that fraud". Accordingly, to the extent that clause 5.5 operated "for the personal protection of Lloyd's or to the disadvantage of Names alleging fraud against Lloyd's", clause 5.5 "was introduced by Lloyd's in bad faith" and is "ineffective in law irrespective [*sic*] of any personal knowledge at the time of the officers and Council members of Lloyd's as to the truth of the allegations of fraud".

The 'bad faith' argument is therefore being run as an *ultra vires* argument directed to the validity of the 1996 resolution which directed the substitute agents to execute on behalf of non-accepting Names a reinsurance contract which included clause 5.5. However it is, in practical terms, indistinguishable from the argument upon the enforceability of clause 5.5 that was considered and rejected by Colman J and the Court of Appeal in 1996/7. Insofar as it alleges an improper dominant purpose, it is founded simply upon an inference which the Court is invited to draw, not based upon any evidence as to what occurred after 1992 and is inconsistent with the whole treatment by Colman J and the Court of Appeal of the character of clause 5.5. The Court of Appeal specifically considered and rejected the argument that clause 5.5 was a protective clause. They pointed out that it did not in any respect affect the liability of the Society to those who were alleging fraud against it. It solely provided a mechanism for the recovery of the reinsurance premiums necessary to the carrying out of the R&R scheme without undue delay.

Tuckey J in his judgment summarised the history of the previous proceedings and considered the character of the proposed 'bad faith' argument. He assumed for the purposes of his judgment that it gave rise to an arguable defence although he observed in passing:

> "At this stage I am only considering abuse and not arguability, but I am bound to note that on superficial acquaintance the bad faith allegation does not appear to me to look at all promising. If it is to be considered at all by the Court at this stage, the EGMF Names have made it clear that it is not a discrete point relating to what happened in 1995/96. Mr Michael Freeman who has much experience of the Lloyd's litigation says in paragraph 6 of his first affidavit sworn for this hearing: 'This is a basic misconception. The bad faith allegation arises out of the fraud previously committed by Lloyd's and is part of and a continuation of that fraud'."

Tuckey J considered the legal principles applicable to abuse of process and the submissions advanced on behalf of the relevant defendants, represented and acting in person. The structured submissions were those of Mr Goldblatt but, for example, Mr Fraser (through his counsel) relied upon the fact that he had been served at a later date and said that he wanted to defend himself on this ground (among others) and asked "why should [I] be prevented from doing so as a result of things which happened in litigation to which [I] was not a party?". The conclusion of Tuckey J was that it was abusive to seek to raise the argument in marshalled litigation when there had been ample opportunity to raise it before Colman J and when it should have been raised at that time. He implicitly held that it was covered by the *Henderson v Henderson* principle which requires parties to raise all the points upon which they may rely and precludes them, save in exceptional circumstances, from seeking to raise them in later litigation. The facts of the case did not come within any of the exceptions to the *Henderson v Henderson* principle. The 'bad faith' argument sought to contradict and reopen the decision of Colman J in 1996, upheld by the Court of Appeal, declaring that the relevant resolution of the Council was valid.

The *Henderson v Henderson* principle only applies as between those who are privy to the previous litigation. As regards those who had been represented by Epstein Grower & Michael Freeman in 1996 no problem of privity arose but there were other Names, such as Mr Fraser, who were saying that they were not party to any litigation at that time and therefore could not be treated as privy to the litigation which was before Colman J in 1996. Tuckey J rejected that argument and similar arguments advanced on behalf of other Names who were more involved than Mr Fraser but less directly involved than some of the Epstein Grower & Michael Freeman Names. The Judge recognised that there was a spectrum of involvement but he declined to make any distinction where the litigation was managed and the purpose of the various hearings was that they should have the character of test cases, favourable decisions being available to all relevant Names and adverse decisions being likewise binding upon all relevant Names whether or not they had appeared before the Court on that occasion.

As regards Mr Fraser, Tuckey J said:

"But what about Mr Fraser? He is not a member of any group and was not served with proceedings until July 1997. He had however received a letter before action. The premium sought was more than £600,000. He does not say that he was unaware of the test cases. He did not make the bad faith allegation until after he learned that the EGMF Names were going to make this allegation. In other words he jumped on their bandwagon. Although he was not sued while the test cases were going on, he must have known that once they were over he would be. He

was therefore interested in their outcome and was content to stand by and see the battle fought by others. No doubt it was because the battle was going on that he was not sued earlier. In the circumstance I think he should be in no better position than anyone else."

Tuckey J therefore concluded that it followed, in his judgment, "that all the Names who wished to make the bad faith allegation were privy to the test cases".

The other liability questions:

Having determined the abuse of process question in this way, the only other liability question with which he had to deal pursuant to the directions which he had given the previous October was the Canadian securities legislation question. He gave his judgment on that in January. Subject to the EEC law point which was reserved for the Court of Appeal should leave to appeal be given, that concluded all the liability questions which had been raised in response to the O.14 summonses. The remaining points which had to be considered before O.14 judgments could be entered were points relating to quantum.

The quantum points:

As previously explained, these were primarily points upon the construction of clause 5. Some of them would, if the defendants' arguments were accepted, require the recalculation of the claims the Society was making against all of the present defendants. Others, essentially the "manifest error" defences were only raised by certain of the defendants, primarily those represented by James Barnett, and would only assist those defendants. However this point was also run in conjunction with the argument that there was "some other reason" why O.14 judgments should not be entered.

Having thus resolved all the liability and quantum issues in favour of the Society, Tuckey J directed that judgment should be entered under O.14 for the sums claimed by the Society against each defendant. He declined to grant any stays of execution. But he does not appear to have altered his previous direction that applications for stays based upon personal circumstances could and should be made to Master Miller. He refused all the Defendants' applications for leave to appeal, hence the applications which are now before this Court.

II. THE CHARACTER OF ORDER 14 PROCEEDINGS

O.14 provides a summary procedure for the entering of judgments in favour of the plaintiff against a defendant for the whole or part of the plaintiff's claim against that defendant. It must be applied for on the basis that it is believed that there is no defence to the claim (or the relevant part of it). O.14 r.3(1) provides:

> "Unless on the hearing of an application under rule 1 either the court dismisses the application or the defendant satisfies the court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason be a trial of that claim or part, the court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed."

The essential question, therefore, is whether the court considers that there is any triable defence to the claim. It is not a procedure for summary trial: it is a procedure for the entering of a summary judgment where the court has concluded that no trial is necessary. A qualification of this principle is that there is no express restriction upon the stage at which an application for summary judgment may be made. Thus, if a point which might otherwise provide a defendant with an arguable defence has already been determined by the court under Order 14A (which authorises the court in suitable cases to determine points of law without a full trial of the action) or the relevant point has already been determined as between the relevant parties in some other way, then it may be appropriate for an O.14 judgment to be asked for at that time and entered in favour of the plaintiff. The procedure adopted by the Commercial Court and the Court of Appeal in 1996 and 1997 adopted this approach. They specifically considered and evaluated a number of alleged defences to see whether they were sound in law and therefore provided an arguable basis for a defence to the Society's claims so as to result in the need for a trial of the various actions as between the Society and the defendants. In this context, as will be appreciated, questions of law are treated differently from questions of fact. Trials are necessary in order to determine triable issues of fact. It is not the function of the Court on an O.14 hearing to make findings of fact. It is its function to consider whether the affidavits lodged by the defendants in response to the O.14 summons raise triable issues of fact which are capable in law of providing the defendant with a defence to the claim or part of it.

It will also be appreciated that this character of O.14 proceedings has implications for the abuse of process/'bad faith' aspect of this litigation. If a particular point has in substance been covered by an earlier judicial decision, particularly if that decision is a decision of the Court of Appeal which is binding on the Commercial judge as it is upon us, then the relevant argument would not on its merits

give rise to an arguable defence regardless of whether or not the previous case was between the same parties or the advancing of the defence could be described as an abuse of process. This is important for present purposes because the end result of the proceedings before Tuckey J was that he entered O.14 judgments against the defendants. It is the setting aside of those judgments which the Applicants before us seek to achieve by an appeal to the Court of Appeal. If the 'bad faith' argument does not disclose a triable defence to the Society's claims in these actions, that challenge to the O.14 judgments will fail regardless of whether or not a successful challenge can be made by some or all of the Applicants to the abuse of process ruling. This ties in with the need for the Applicants to obtain the leave of this Court to appeal. It is not appropriate (save in very exceptional circumstances) to grant leave to appeal to an applicant to argue a point before the Court of Appeal which is not going to affect the outcome of the relevant litigation or provide a basis for setting aside or varying the effective order of the court below.

Thus, if a particular argument is already covered by an adverse decision of a court, that establishes as a matter of law that that defence does not give rise to a triable issue. If the other decision is binding upon the relevant court then it is within its own terms conclusive. If it is not binding, then the relevant defendant has to make out a persuasive case that the previous decision was wrong in law. Criteria of abuse of process are not relevant in that context. The previous decision states the law for all purposes not merely for the parties who were before the court on that occasion.

But if there is some basis for distinguishing the previous decision, then the law has to be considered afresh. Thus, if it were the case that the present Applicants were relying upon fresh evidential material not previously relied upon or were able to show that the relevant facts (assumed or *prima facie* established) were materially different from those which formed the basis of the previous legal decision, the court would have to consider whether, upon the new material or facts, the legal conclusion would remain the same. (It makes no effective difference whether the question of what is covered by the previous decision arises in relation to precedent or abuse of process: Ashmore v British Coal [1990] 2 QB 338 at 349 and House of Spring Garden v Waite [1991] 1 QB at 255, both per Stuart Smith LJ.) The fundamental difficulty which the Applicants have to face is not the abuse of process ruling of Tuckey J in December last year but rather the difficulty of showing that there is actually any legal substance in the 'bad faith' argument or that it is possible to escape from or fault the conclusions of Colman J and the Court of Appeal on the failure of the fraud allegations to provide the defendants with defences to these claims.

For the purposes of O.14 proceedings it may be, and it has been in these cases, necessary to consider questions of liability and quantum separately. If any of the liability defences are triable the

court should either give unqualified leave to defend or conditional leave to defend depending upon the scope of the defences which it considers triable. As regards quantum defences, although these are claims for liquidated sums (not damages), the court could properly enter a declaratory judgment and/or a monetary judgment up to any limit to which no triable defence had been shown and refer the assessment of quantum or of the balance remaining in dispute to be the subject of a trial before a judge or master. In this context some of the Applicants have submitted that there was a special reason within the provisions of O.14 r.3(1) why judgment should not have been entered as, they submitted, further investigation was required coupled with further discovery before it could be said that there was no defence on quantum. Provided their submissions on the construction of clause 5.10 were sound and their criticisms of the Society's figures sufficiently cogent, this submission would have force: the relevant question was whether the challenges made to the Society's case on quantum created such a situation.

III. LIABILITY: THE "BAD FAITH" ARGUMENT

We have earlier set out what this argument was and how it was alleged to provide a defence to the Society's claim against non-accepting Names. It has several features:

(1) It purports to raise an *ultra vires* argument which invalidates the Council resolution pursuant to which the substitute agent executed the reinsurance contract on behalf of each non-accepting Name. (Step 3(b) in the formulation of the Society's claim.)

(2) It is based upon the same allegation of fraud on the part of those for whom the Society was alleged to be responsible as were the other fraud based defences which failed before respectively Colman J and the Court of Appeal.

(3) The *ultra vires* argument was effectively the same as that considered and rejected by Colman J since it sought to negative the conclusion that the making of the relevant resolution was within the powers conferred on the Society and its Council.

(4) Insofar as the argument seeks to contradict the conclusion that the R&R scheme was a genuine scheme for the restructuring of the market in the interests of the market as a whole and as a proper exercise of the Society's supervisory function, the argument is inconsistent with the conclusions of Colman J and the Court of Appeal as to the purpose of the scheme.

(5) Insofar as the argument is based upon considerations of public policy and not permitting a party to take advantage of his own fraud, the argument is also inconsistent with the decisions of Colman J and

the Court of Appeal upon the validity and enforceability of clause 5.5: the argument is being used for exactly the same ultimate purpose, to render ineffective and unenforceable clause 5.5.

(6) The allegation of bad faith at the time of the making of the 1996 resolution makes no allegation of any fraudulent conduct at that time and is simply based upon an inference which the Court is invited to make as to the state of mind of certain individuals in 1996 without any evidential basis: no evidence is relied upon beyond that already relied upon at the time that Saville LJ gave the ruling which we have quoted above during the hearing in the Court of Appeal in July of last year.

Only one conclusion is proper. The 'bad faith' argument provides no basis for distinguishing the previous decisions: it provides no basis for the argument that any of those decisions were wrong. The allegation made does not bear factual or legal examination. This was an R&R scheme within, as has been held, the powers of the Society. Clause 5.5 was an obviously appropriate part of the Reinsurance Contract which was an essential part of that scheme. A no set-off clause is a standard type of clause. It is to be found in a number of types of contract (Coca-Cola v Finstat *sup*, WRM Group v Wood, CA, 21 November 1997) and held to be effective. It is a standard clause found in Names' agreements with their agents in Lloyd's.

In Arbuthnott v Fagan decided in July 1993 (since reported at [1996] LRLR 135), the Court of Appeal held that such a clause did not provide any fetter on the bringing of a cross-claim for negligent underwriting. They described the character of the clause. Bingham MR said:

> "The duty of the Name to pay sums required by the agent without prevarication or deduction or delay is stated clearly and unequivocally. That reflects the overriding need, acknowledged on all sides, to ensure that funds are available for the prompt settlement of the claims of those who have insured or reinsured at Lloyd's." (p.139)

Hoffmann LJ said:

> "The purpose of clause 9 is clear and uncontroversial. It is to insulate the liability to the Name to provide whatever funds are necessary for the underwriting business from the state of accounts between himself and the agent. Such insulation is necessary for the purpose of enabling the Lloyd's market to meet its liabilities. Otherwise the flow of funds needed to pay policyholders' claims may be clogged by disputes within Lloyd's and their agents to the detriment of the market as a whole." (p.141)

It is not irrelevant that this decision pre-dates the R&R scheme. It strongly confirms that it would have been most surprising if the scheme had not included a no set-off clause. It clearly establishes that such a clause is an essential and valid part of the proper operation and supervision of the market and that the

clause is not protective of the alleged wrong-doer and does not affect the rights of the Name against him.

In Marchant v Higgins [1996] 2 Lloyd's 31 (December 1995) the Court of Appeal, upholding a judgment of Rix J of October the same year, rejected an argument that the no set-off clause was contrary to EEC law, even though it was being relied upon on behalf of the Society to assist to protect the Central Fund. Leggatt LJ said:

"Without some form of 'pay now sue later' obligation, Lloyd's could not function."

These authorities show that, in the absence of some persuasive evidence to the contrary, no inference of a "dominant purpose" to defeat claims for fraud against the Society could possibly be justified. The existence of such claims made the clause the more not the less necessary in the interests of the market as a whole and ensuring that the claims of insureds and reinsureds were properly and promptly paid. Mr Thomas-Everard's eloquent oral submissions served to confirm not refute this conclusion: without the clause, the R&R scheme would probably fail.

The 'bad faith' argument provides no basis for giving any Applicant leave to defend or leave to appeal to this Court from the O.14 judgments which have been entered against him.

Had our conclusion been different it would have been necessary for us, in this judgment, to evaluate the merits of various other arguments which have been advanced in this connection by one side or the other. Insofar as the abuse of process ruling was relevant to these applications, the Applicants' argument on general principle was, in our judgment, without substance. It is an abuse of process for parties coming within a scheme of marshalled litigation to seek without justification to avoid the outcome of the cases which have been selected for hearing. It is essential to the proper conduct of such litigation and the resolution or other disposal of the disputes to which it has given rise that all those coming within the ambit of the marshalled litigation should be required to abide by the outcome of test cases for what they decided. (Ashmore v British Coal *sup* at pp.350-2) If they consider that their interests are not adequately being taken into account, they should apply for some special direction or for leave to intervene. In the present case some parties chose to intervene at various stages and to advance arguments to the Court; others chose to stand on the sidelines, not incurring or risking any legal costs themselves, waiting to take advantage of any decision favourable to them. By the same token the administration of justice and considerations of the fair disposal of litigation require that they should be bound by such decisions even though unfavourable to them and even though they have chosen not to intervene or address the Court. The attack on the primary reason given by Tuckey J fails.

It is at the stage of the second part of his reasoning, his view as to who were to be treated as privy to the 1996/7 proceedings, that matters would have had to be considered more closely and some individual Applicants might have established that they should be given leave to appeal. As Tuckey J recognised, there was a spectrum between, at the one end, those Names who had instructed Epstein Grower & Michael Freeman, who were without doubt bound by the outcome of the 1996/7 proceedings, and those at the other end of the spectrum, persons such as Mr Fraser who had merely had notice of intended proceedings but upon whom no writ had been served nor any other document or summons relating to the proceedings pending between the Society and other non-accepting Names. It has been said that he could have chosen to apply to intervene. But it can be said with equal or greater force that if the Society did not choose to commence proceedings against him and did not choose to apply for any order against him which put him on terms as to the raising of defences or required him to be bound by the outcome of those other proceedings, there is no adequate reason why, when he is sued, he should not then assess for himself what defences he wishes to raise and, raise them for what they are worth. We do not consider that that can be regarded as an abuse of process. If a point was not raised or not decided in the previous litigation, why, one asks, when he is sued, should he not raise it if he believes that it provides him with a defence to the claim made in the action against him? If this had been the ground upon which an Applicant for leave to appeal before us had failed to get leave to defend, we would have granted him leave to appeal. But that is not the case; as regards such an Applicant, the 'bad faith' argument fails because it is wholly without merit not because the raising of it was, for that Applicant, an abuse of process.

Had the 'bad faith' argument had merit it would have been necessary to look at where in the spectrum various individual Applicants for leave to appeal fell, whether towards the Fraser end or the Epstein Grower & Michael Freeman end. Numerically the number who would have been found to be on the right side of the line was probably very small. Similarly, it has not been necessary to investigate the extent to which individual represented or unrepresented Names were to be treated as barred by the October direction of Tuckey J from relying on this point. There was an understandable tendency of certain of the unrepresented Names to seek to take advantage of any argument which was advanced by any other party before us. It would not have been appropriate to grant leave to appeal on that ground to any Name who had failed to comply with the direction of Tuckey J.

It follows that neither the 'bad faith' argument nor the challenge to the abuse of process decision provides a basis for any Applicant to be given leave to appeal to this Court.

IV. LIABILITY: CANADIAN SECURITIES LEGISLATION

This was a freestanding point which was argued on behalf of certain overseas Names represented by Warner Cranston and Charles Russell. There are no procedural complications. It was agreed by all concerned that the case of a Canadian non-accepting Name, Mr Donnel Russell Daly, should be taken as the test case. We heard full argument in support of the application from Mr Leczner QC on behalf of the Applicants and we were assisted by written submissions, documentary material and citation of authority. The relevant question was one of conflict of laws. The relevant contracts contain an express English law and jurisdiction clause. The Rome Convention does not apply. There was no dispute as to the facts, including the Canadian law, specifically the law of the Province of Ontario, upon which this question fell to be considered.

Mr Daly is and was at all material times a Canadian citizen resident in Ontario. In 1987 it was suggested to him by a Canadian acquaintance of his who was a Name that he, Mr Daly, might be interested in also becoming a Name. As a result Mr Daly had sent to him by post from London documentary material about Lloyd's and a brochure from R.W. Sturge & Co. These documents set out with some particularity what it was said was involved in becoming an underwriting Name and what were the financial and other implications. It could fairly be commented that the relevant documents read something like a prospectus. After reading all this material and attending a meeting in Toronto at which R.W. Sturge & Co made a presentation with a view to recruiting additional underwriting Names, Mr Daly was persuaded that it would be in his interests to apply to become an underwriting Name. He was therefore sent by mail to his Canadian address a membership application form and a sponsorship nomination form. He completed and signed those at his home in Canada and posted them back to R.W. Sturge & Co in the summer of 1987. It was to be assumed that R.W. Sturge & Co were *inter alia* acting as the agents of the Society in recruiting Mr Daly. The documentary material sent to Mr Daly included material emanating from the Society itself.

His application was to be accepted as an underwriting member of Lloyd's with effect from the start of the 1988 underwriting year. He selected a member's agent, John Stephens, and, having received and returned further documents, he was called to London in November 1987 to attend a meeting at Lloyd's with members or representatives of the Committee of the Society. At the conclusion of the meeting his application was accepted and the other relevant documentary formalities completed. The contractual documents which he had signed and which contained the relevant undertakings on his part were all expressly stated to be governed by English law and subject to the jurisdiction of the English courts. Thus the proper law of all the relevant contracts was English law. The contracts were made in London at the time his application was accepted. The relevant obligations which he undertook to the Society to perform were all obligations to be performed in London. It was not a contract which called for any performance in Canada. On the completion of his visit to London

Mr Daly returned to Canada.

The relevant law of the state of Ontario was deposed to in an affidavit of Mr James C. Baillie QC. He summarised it in these terms:

"(a) The membership arrangements constitute a "security" under Ontario law;

(b) This means that Lloyd's could not engage in the sale procedure and enter into membership arrangements with Mr Daly, unless:
(i) there was compliance with the Ontario statutory requirement that a preliminary prospectus and a prospectus be filed and receipts therefor obtained from the director of the Ontario Securities Commission; or
(ii) there was an available exemption from these prospectus requirements; and

(c) As neither of the above conditions was met, the sale procedure was conducted in an illegal manner and the obligations incurred by Mr Daly under the membership arrangements and through the Underwriting Relationship are not enforceable by Lloyd's, the party responsible for the illegality."

He amplified what he said in the last sentence saying:

"The result of there not having been compliance with the prospectus requirements is that the sale procedure was conducted in an illegal manner and, consequently, the obligations incurred by Mr Daly under the membership arrangements through the underwriting relationship are unenforceable by Lloyd's against Mr Daly."

The relevant Ontario legislation exists for the protection of the investor. The investor can if he chooses obtain a declaration that the relevant contract is void and he can resist any attempt to enforce the contract against him. On the other hand, if the contract is to his advantage, he can enforce the contract against the other party notwithstanding that other party's illegal failure to comply with the registration provisions. A breach of the registration provisions is a criminal offence under the Ontario Act.

The question raised therefore is whether the fact that an act illegal under the law of Ontario preceded and led to Mr Daly's subsequently entering into a contract in England governed by English law and the fact that the contract would be unenforceable in Canada against Mr Daly has the consequence in English law that the contract is unenforceable against Mr Daly in the English courts.

On established principles of English private international law any question of the material or essential validity of a contract is governed by its proper law (Dicey Rule 184) - here English law. Similarly no question of formal validity under a foreign law can arise where the contract is both made in this country and governed by English law (Dicey Rule 183). Any invalidity or lack of enforceability

under a foreign law is irrelevant.

Mr Leczner in his argument sought to escape from this conclusion by relying upon two acknowledged exceptions to the general rule to which we have referred. The first is that English law will not enforce a contract insofar as it requires the performance in a foreign country of an act contrary to the law of that foreign country: Ralli Bros v Co Nav Sota y Aznar [1920] 2 KB 287. Similarly an English court will not enforce a contract which has as its purpose the breaking of the laws of another country, Foster v Driscoll [1929] 1 KB 520, even if it would be capable of performance without committing such breach: Regazzoni v Sethia [1958] AC 301. This line of argument did not assist the Applicants because the contract between Mr Daly and the Society did not require or involve the performance of any act in Ontario contrary to the law of Ontario, nor did it have as its purpose the commission of any breach of the law of Canada or any Province.

The second way the Applicants' case was put was to rely upon the exceptions recognised in Re: Missouri Steamship 42 Ch D 321 at p.336, per Lord Halsbury:

> "Where the contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world and no civilised country would be called on to enforce it."

In Vita Food v Unus Shipping [1939] AC 277 at 297, Lord Wright said:

> "In this passage Lord Halsbury would seem to be referring to matters of foreign law of such character that it would be against the comity of nations for an English court to give effect to the transaction just as an English court may refuse in proper cases to enforce performance of an English contract in a foreign country where the performance has been expressly prohibited by the public law of that country. The exact scope of Lord Halsbury's proviso has not been defined."

The Applicants submit that the enforcement of the present contract against Mr Daly does offend against a principle of universally recognised positive law and that it would be contrary to the comity of nations that English courts should enforce it.

This submission cannot be accepted. No question of enforcing any act which would involve infringement of the law of Ontario was involved. The provision is regulatory in character (Pezim v Att-Gen British Colombia 114 DLR 385). It exists in Ontario and other parts of Canada but is not a universal one and, for example, there does not exist in English law any equivalent provision which prevents the enforcement of this contract against Mr Daly or any other underwriting Name. No question of infringement of comity arises. In this connection it is to be observed that the question of

comity was considered by the Court of Appeal in their Judgment of July 1997. They said:

> "This Court is bound to proceed in accordance with settled principle and is not to be fettered by speculative regard as to how its judgment may be received abroad." (p.28)

Further, the two cases relied upon in this context, the *Missouri* and *Vita Food* cases, both involved the enforceability of contracts which contravened the law of the place where they were made so that they would be treated as illegal and invalid or unenforceable by the law of that place but were upheld as fully enforceable because they did not contravene the chosen proper law.

Established authority which cannot be seriously questioned demonstrates that the argument advanced based upon the Canadian securities legislation provides no defence. These contracts must be enforced in accordance with English law. No question of public policy or comity is involved. Indeed, as is pointed out in the skeleton argument on behalf of the Society, the acceptance of this argument would mean that the insurance contracts entered into by Mr Daly would likewise be void and unenforceable, a consequence which for obvious reasons Mr Daly disclaimed, because their validity under English law depended upon the validity of Mr Daly's underwriting membership of Lloyd's. If he was not an underwriting member of Lloyd's he could not lawfully enter into any insurance contract, as an insurer, in England. No principle of comity or public policy would suffice to justify that result and, as we have said, it was one which Mr Daly has implicitly recognised to be unacceptable.

Accordingly, for reasons which are substantially the same as those given by Tuckey J, the arguments based upon the Canadian securities legislation did not provide any basis for giving leave to defend and do not provide any basis for giving leave to appeal. The Canadian Names' general application for a stay of execution must also fail for the reasons given by the Court of Appeal in 1997.

V. LIABILITY: EEC LAW

For the reasons already given, this point was not considered by the Court below. But we have had the benefit of full argument upon it, and in particular that of Miss Anderson who appeared to argue this point on behalf of the Names represented by James Barnett. The argument is that between 1980 and 1990 the Society was responsible for breaches of Council Directive 73/239/EEC as subsequently amended by the Directives 88/357/EEC and 92/49/EEC, respectively the First, Second and Third Non-Life Insurance Directive. It is submitted that these Directives had "direct effect" against Lloyd's as the body to whom the United Kingdom's obligations to supervise and regulate insurance had, in the material context, been statutorily delegated. Miss Anderson recognised in her submissions to us that the argument could not be used to render illegal the R&R scheme and what had been done pursuant to

it. Her submission was that it was the obligation of the United Kingdom through its courts to give effective remedies to those who had been disadvantaged or suffered loss by reason of breaches of the Directives and therefore clause 5.5 should not be applied or regarded as enforceable in relation to cross-claims arising from alleged breaches of the Directives. Alleged breaches of the Directives should be treated as giving rise to defences to the claims for premium.

The submission of these Defendants therefore involved a number of steps.

(1) The Directives imposed obligations upon the United Kingdom in respect of the regulation and supervision of non-life insurance.

(2) In respect of the Lloyd's insurance market, those obligations were, under United Kingdom law and the Insurance Companies' Act 1982 (as amended) to be performed by the Society.

(3) The Society was in breach of the obligations stated in the Directives.

(4) The Defendants have suffered loss as a result of such breaches.

(5) It is the obligation of the courts of the United Kingdom to give effective remedies in respect of such breaches.

(6) That obligation requires that clause 5.5 be regarded as ineffective and unenforceable in relation to the Defendants' claim for damages for the Society's breaches.

Whether or not other steps involved in this proposed defence are or are not unsound, steps (3) and (6) present, in our judgment, insuperable difficulties for the Defendants.

The acts and omissions of the Society upon which these Defendants rely in support of their allegation that there have been breaches of the Directives relate to the events of the early and mid-1980s. They do not relate to what occurred in the years following 1990 and the R&R scheme itself. This is important because there are three Directives upon which they rely none of which had retrospective effect. The Third Directive only came into force on 1st July 1994. It follows that these Defendants cannot rely upon any breach by the Society of the requirements of that Directive. They do not rely upon any alleged breach of the Second Directive. It is therefore to the provisions of the First Directive which one must look in order to see whether the Society has been in breach of EEC law. It was that Directive which she would have to persuade a court had direct effect - a dubious proposition. It was a feature of Miss Anderson's submissions that she did not consistently face up to this difficulty in her case and that she really founded her argument upon the amendments to the First Directive introduced by the Third Directive.

The recitals to the First Directive refer to Article 57(2) of the Treaty and to the need to establish uniformity and have regard to the need for insurers to have adequate reserves having regard to premiums and claims and the need to guard against the consequences of insolvency. Article 1

provides:

> "This Directive concerns the taking up and pursuit of self-employed activity of direct insurance carried on by insurance undertakings which are established in a member state or which wish to become established there in the classes of insurance defined in the annex to this Directive."

Article 6 requires the Member State to make the taking up of the business of direct insurance in its territory subject to official authorization and the lodging of a deposit or the provision of security. Article 13 requires the Member States to collaborate closely with one another and Article 14 provides that:

> "The supervisory authority of the Member State in whose territory the head office of the undertaking is situated must verify the state of solvency of the undertaking with respect to its entire business."

This is the extent of the provisions to which these Defendants can properly refer. It would have to be established that they had direct effect. These provisions were given effect to in the 1983 Act and the supervisory regime contemplated was set up including a supervisory regime for the Lloyd's market. (sections 83-86) At the time of the first Directive, the Council of the European Communities was concerned with setting up certain structures and goals with a view to introducing at a later stage more specific requirements. This is what happened when the Third Directive in 1992, in substitution for Articles 13 and 14 and 15 of the First Directive, introduced requirements which were more specific and were those which Miss Anderson used to support her argument that there had been breaches of EEC law, an argument which as we have earlier observed failed to take account of the date at which the Third Directive came into force.

The argument of these Defendants also ran into difficulties at stage (6). Remedies are a matter for the local court. But the obligation of Member States to comply with EEC law includes the obligation to provide effective remedies for any infringement of those laws. In the present case, under English domestic law, as the Court of Appeal have held last year, clause 5.5 does not deprive the Names of their remedy. Clause 5.5 provides no defence to the Society against any claims which Names may make in respect of fraud or breaches of EEC law for which the Society is responsible. The Names have a remedy and, in respect of their fraud allegations, are exercising it. If they had considered that they had an arguable and meritorious claim against the Society in respect of some breach of EEC law, they could and should have sought a remedy from the courts in respect of it by commencing the appropriate action against the Society. They are not being denied an effective remedy. They have had ample opportunity to bring such an action had they so chosen. Clause 5.5 does not involve any breach of EEC law. The courts of this country are entitled and, on the decision of

the Court of Appeal, obliged to accede to the reliance of the Society upon the provisions of clause 5.5.

EEC law does not provide these defendants with an arguable defence to the claims of the Society to the premium and provides no basis for giving leave to appeal from the Order 14 judgments that have been entered against them. It also follows that their submisions have provided no basis for a reference of any question to the European Court of Justice.

VI. QUANTUM

Introduction:

All the points relevant to quantum involve clause 5 of the Reinsurance Contract. Accordingly, the material parts of clause 5 are set out in an Appendix to our judgment.

The primary claim of the Society in each of the actions was for the sums set out against the relevant Name in the first schedule to the Reinsurance Contract. (Clause 5.1(b)(i).) Certain of the Names had questioned whether the first schedule had been properly completed and incorporated as part of the executed Contract. Before he was willing to enter judgment under O.14 Tuckey J required to be satisfied about this point. When these applications first came before us some Names were still questioning whether the Society had demonstrated that this was the case. We accordingly called upon the Society to produce the original of the Contract as executed so as to settle this point once and for all. The Society did produce the original and the Defendants now acknowledge that they have no point upon the incorporation of a completed Schedule 1 into the Reinsurance Contract.

Further points under clause 5.1 and clauses 5.6 and 5.9 have been raised. They were primarily argued by Mr Goldblatt. His argument took us through a large number of provisions of these complex contractual documents. They illustrate one of the difficulties about O.14 summonses in cases such as this. Where the contractual scheme requires explanation so that the court may understand it and the point which a defendant seeks to raise on it, the court may have to hold quite a lengthy hearing in order to be put in a position to decide whether or not the submitted defence is arguable. However the need for such exposition and explanation does not demonstrate the need for a trial. It is still the function of the court to decide whether or not the point sought to be raised is one which calls for a trial.

Finally there were the points arising under clause 5.10, the conclusive evidence clause. These points were primarily argued by Mr R Mathew QC. If any of the points under the earlier parts of clause 5 should succeed, this would itself suffice to establish manifest error under clause 5.10; Mr Matthew's argument, whilst raising points on the construction of clause 5.10, related also to detailed

aspects of the figures relied on by the Society. Mr Goldblatt argued similar points.

Personal Expenses:

Personal expenses include such items as the Managing Agent's fee, Lloyd's membership subscription, Lloyd's Central Fund Contribution and Lloyd's Central Fund Levy. In the ordinary course these sums would be disbursed by the Name's Managing Agent pursuant to the authority given to him by the Name's contract with him. Insofar as they involve payments to others, the Managing Agent will be entitled to have access to the sums (or security) held by him on behalf of the Name. Indeed, the normal accounting procedure would be that the Managing Agent when accounting to the Name for the results of an underwriting year (or for the purposes of making a call upon the Name) would off-set the debit and credit items in the account and only pay to the Name, or call for from the Name, the balance.

The Names submit that Names' liability for personal expenses should not have been included in the computation of the Name's premium under clause 5.1. This point is of importance as the sums are significant; for some Names, if they were left out of the account there would be no premium due. The argument on behalf of the Names can be, and has been, attractively presented. In simple terms, it is said that the claim made is a claim for the "Name's Premium" under the Reinsurance Contract. The calculation and payment of a premium relates to the acceptance of an insurable risk. Personal expenses have a different character. They do not relate as such to the acceptance of a risk. For example, payment of the Managing Agent's fee is simply remuneration for a service rendered, or supposedly rendered, by the Managing Agent to the Name. Similarly it can be said that when in clauses 5.1(b)(ii)-(iv) "Losses" are referred to they are underwriting losses not items of personal expenditure. Underwriting losses can properly include such things as salvage and litigation expenses but they do not and cannot on a proper use of language include such things as the remuneration to be paid to the Managing Agent.

On the other hand, it is submitted on behalf of the Society that the character and purpose of the contract is, as its title implies, "Reinsurance and Run-off". The structure involves a transfer to Equitas of the various Syndicates' (and therefore Names') liabilities and assets. This structure involves bringing into the account the outstanding debit items for which the Name is liable including the items included under personal expenses. The word "losses", it is submitted, refers to the aggregate of these debit items since they would be included on the debit side of the account in any assessment whether, for any given year, the Name had made a profit or a loss as a result of his membership of a given syndicate and out of his underwriting activities at Lloyd's as a whole.

Having been taken through the structure of these documents and having been assisted by the submissions of counsel on both sides, we are satisfied that Tuckey J was clearly right and that the argument of the Names cannot be supported and that the submission of the Society is clearly correct. The Finality Statements show personal expenses as part of the Name's outstanding liabilities included in the calculation of the premium. Clause 7 of the Contract shows that Equitas is effectively taking over the Name's liability for such personal expenses. The same follows from section D of the Settlement Offer Document. These expenses come within this part of the R&R scheme, in contrast to sums which a Name is or may become liable to pay to the Society when the Central Fund has been called upon to pay a claim on behalf of a Name, which do not. There is thus a correspondence between the computation of the premium which the Name is being called upon to pay and the liabilities of the Name which Equitas is agreeing to cover. Similarly the expression "losses" is within the scheme of the contract properly used to reflect the Name's losses as against his managing agent(s).

It follows that clause 5.1 must be construed as contended for by the Society and that Tuckey J was right. The argument on personal expenses does not provide a basis for giving leave to appeal.

CLSF and PSL

These items relate to the credit side of the calculation of the Name's premium. CLSF stands for "Combined Litigation Settlement Funds". PSL stands for "Personal Stop Loss". They are referred to in clauses 5.6 and 5.9. The critical question was whether, upon the true construction of the Contract, the Society was *obliged* to allocate and apply these credits to the reduction of the Name's premium. If the Society was under that obligation, it is common ground that it has not done so. The submission of the Society is that it is not obliged so to apply those credits so far as non-accepting Names are concerned. Tuckey J considered that this submission was correct and that no arguable defence was disclosed.

This point is really concluded by the express terms of clause 5.6 and 5.9 neither of which include the obligation contended for by the Names. It is a question of the allocation by the Society of the relevant credit to the reinsurance premium and not to some other liability or potential liability of the non-accepting Name. This is one of the parts of the R&R scheme where a distinction is drawn between accepting and non-accepting Names. The non-accepting Name has no *right* to have that allocation made. The first sentence of clause 5.6 deals with where any part of the Name's Premium has been "discharged by Lloyd's". The second sentence concludes with the words "but only, in the case of a Name who is not an accepting Name, where Lloyd's appropriate such sum to the Name's account or benefit and expressly for the purposes of discharging the liability".

Clause 5.9 is similarly worded. It gives a right to Equitas to set-off against the Names' Premium of a non-accepting Name any amount which Equitas would, as a result of the R&R scheme be obliged to pay that Name as the entity which has adopted (by reinsurance) the liability of the PSL underwriter to indemnify the Name. It does not give any right to the Name; it gives a right to Equitas. The position remains as provided for by clause 5.5 that the non-accepting Name is not entitled to any set-off by reason of a PSL claim.

This position is confirmed rather than contradicted by the other documents which formed part of the settlement offer. One of the documents upon which the Applicants sought to rely was the finality statement which was given in August 1996 to each Name. These documents, far from supporting the submission of the Applicants, confirmed the distinction that was being made between accepting and non-accepting Names and the assessment of the outstanding liabilities being used for the purpose of calculating the reinsurance premium without the prior allocation of such cross items in reduction of it. Similarly at page 4 of the R&R document it said:

> "A Name who does not validly accept the settlement offer and pay his finality bill as set out above will not receive any of the benefits of the settlement offer, subject to the following limited exceptions. If any such Name is a member of an action group which commits all of its members to settle that action group's claims, he will receive the benefit of that part of his combined litigation settlement funds allocation relating to those claims and the action group will receive the expenses refunds relating to his membership of that action group. Such a Name will receive no other benefits of the settlement offer. In order for a Name to qualify for these benefits, the relevant action group must, on behalf of all its members, enter into an action group settlement agreement as described in chapter 2."

There was a further explanation of this position at page 52 of the same document. In explaining what will be set against a non-accepting Name's liability to pay the premium express reference is made to -

> "any part of any combined litigation settlement funds allocation [the Name] may be entitled to by virtue of any action group of which he is a member entering into an Action Group Settlement Agreement *and which is paid to Equitas.* The allocation will be recorded in the data supporting finality statements but there will be deducted any part of the combined litigation settlement funds which is represented by judgment monies held in solicitors' accounts and interest on those amounts unless the non-accepting Name procures the payment of those monies to his premium trust fund trustees by appropriately executing a payment form and such other documents as Lloyd's may require for this purpose ..." (*emphasis supplied*)

The same position is made clear in general terms at page 65 and in more specific terms at page 107

and page 2 of Appendix 2 to that document. The allocation has to be made and the money actually received by Equitas. This does not mean that any recovery to which the Name is entitled will be lost but that, for the purposes of clause 5 and in particular clause 5.10, the allocation has to be made before it is taken into account in the computation of the Name's premium. If a Name should hereafter consider that he is entitled to some credit which has not been allocated in this way to his Name's Premium, that is a matter for him to take up with the Society, Equitas or other accounting party. The O.14 judgment does not preclude him from doing so; he was not entitled to set-off the credit as a defence to the claim for the Name's premium (cl. 5.5).

Having carefully reviewed these provisions and the claims which have been made in the action we are satisfied that the Judge was right and that the computation of the premium was made in accordance with the provisions of clause 5. The non-accepting Names received the credits to which they were entitled at that stage. As regards non-accepting Names, they have other outstanding liabilities (see page 52, referred to above) and the Society were entitled to reserve their allocation of credits and were under no liability to make the contended for deductions in the calculation of the Names' premium recoverable under clause 5 of the Reinsurance Contract.

Clause 5.10: The Conclusive Evidence Clause

Clause 5.10 is drafted in comprehensive terms. It is not an unusual type of clause and is in principle appropriate to this contract. If, as discussed in the preceding parts of this judgment under the heading Quantum, the Applicants had been able to show that the Society or Equitas or CSU (now MSU) had misconstrued the contract, then it would have followed that the calculations would have had to have been reopened. But that is not the case. The records of and calculations performed by MSU are to be conclusive evidence of the amount of the Names' Premium as set out in clause 5.1(b) and the amount by which it has been discharged by the transfer of assets or other sums realised, save for "any manifest error".

The calculations have been produced together with the figures upon which they are based derived from the records of the CSU. The exercise has been a highly complex one. It has necessitated the CSU in collecting and collating the figures from each syndicate of which the given Name was at any material time a member. The resultant calculations lead to the assessment of a reinsurance premium which the Name is required to pay under clause 5.

The first argument of the Applicants was that they were entitled to inspect and check the accuracy of the records in the possession of the MSU and the figures derived from them. This

submission involved a contradiction of both the express wording and clear intention of clause 5.10. The MSU was the body which was charged with the responsibility for undertaking that task and it is the fruits of their work that are to be taken for the purposes of settling the liability of the Name for his reinsurance premium under clause 5.

It was argued that it was impossible to tell whether there was any "manifest error" in the figures unless such an investigation was carried out. This too, was a contradiction of the provisions of this clause. The figures are to be taken as correct unless in their own terms they manifestly cannot be correct or if the Name by pointing to some other piece of evidence can demonstrate that they clearly cannot be correct in some respect. It is for the Name to identify and demonstrate some clear error. The Applicants who are relying upon this point have not shown any arguable case that they are able to do this.

It will be appreciated from what we have said that we have not accepted one of the arguments put forward by counsel for the Society that only internal inconsistencies in the figures can be looked at for the purpose of showing manifest error. Had, for example, a Name been able to show clearly that another Name's data had been used in place of his, that would have sufficed to show at least an arguable case of manifest error. Indeed, one Name, Mrs Strong, did seek to put forward just such a case but failed to put forward clear evidence to show that a such an error did in fact occur or that there was an error such as arguably to give her a Quantum defence.

The Applicants have pointed to differences in the figures produced by CSU/MSU or the Society at various dates. Where such differences were relied upon by the Applicants, the Society has shown that they are attributable to changes in the position of the Name as between one date and another taking into account debits and credits which have been properly included. Such differences did call for an explanation but the Society has given explanations of these differences; they have been rehearsed in the affidavits and/or the skeleton arguments. The explanation having been given there is no further point which the Applicants can raise on the basis of that argument. It does not demonstrate manifest error.

One of the examples which was taken was the treatment of Captain Hindle where there were at first sight quite striking differences between the figures given in various documents. However, on analysis, they were shown to be consistent with each other partly because of the changing situation over time and partly because of the need or election to treat certain items differently. Thus certain balances derived from the August 1996 finality statement were inapplicable to Names who had not accepted the settlement and who subsequently were being called upon to settle the Names' Premium as a non-accepting Name.

Another argument which was advanced was that since the Society has for some individual Names admitted that the figures were wrong and has corrected them shows that all figures need to be thoroughly checked and that no judgment should be given until such further checking has taken place. This argument does not support the conclusion which it seeks to reach. It shows that in cases of manifest error the Society has been prepared to recognise that the error has been made and to correct the figures accordingly. It is not to be concluded that in respect of Names where there is no basis for suggesting that there has been a manifest error that such an error has occurred.

The figures produced have been further criticised on the basis that they do not show what credits have been given to the Names in the various accounts. If this submission were correct in fact it would provide a powerful argument. It is always essential in rendering an account or striking a balance that the items which have been included on each side of the account shall have been properly identified. Where the item is a credit item, it is necessary for the party being called upon to pay the account to know whether a given credit has already been set-off in the account or whether he is entitled to claim for it separately or require credit to be given for it in some later account. This is particularly so where the relevant contract includes such a clause as 5.5 which requires the debtor to pay the sum demanded without set-off at that time and where the contract gives the Society a right to chose whether or not to allocate a particular credit to the Name's premium. However, it is clear from the evidence that this point having been raised on behalf of some of the Names, the Society has been able by the second and third affidavits of Mr Bradley and the exhibits to it to demonstrate that the figures provided do give the requisite information for present purposes. However, as the 10th affidavit of Mr Freeman demonstrates, there may nevertheless be unresolved questions as to other credits which certain Names may believe they are entitled to or for which they believe that the Society or Equitas or other relevant entity has never properly accounted to them. If so the relevant Name must hereafter exercise any right he has to have an account taken and/or be paid the unallocated balance. The O.14 judgment only covers those credits which have been allocated to the Name's premium.

It is understandable that those who already have a deep distrust and suspicion of the Society and its various agencies should be suspicious and ready to find fault with the figures which have been produced pursuant to clause 5.10. But such matters do not provide arguable defences. The O.14 summonses having been properly supported by affidavits sworn on behalf of the Society, it was incumbent upon the Defendants to show by affidavit that there was some ground for giving leave to defend on quantum and ordering a trial of some issue of quantum. No issue has been raised which is sufficient to justify going behind the figures produced under clause 5.10 nor have the Applicants succeeded in making out a case of manifest error in those figures.

It follows that on the Quantum aspects as well we agree with the Judge that leave to defend should not be given and consequently that leave to this Court against the O.14 judgments should not be granted.

VII. THE LITIGANTS IN PERSON

Introduction:

As previously stated a number of the Applicants were not professionally represented in this Court. They have submitted documentary material to us in a variety of forms, affidavits, letters, skeleton arguments etc. and, with the exception of Mrs Strong, have taken advantage of the opportunity to address us orally. One of the complaints some have made is that their submitted defences were not adequately considered by the Judge or specifically dealt with in his judgments. We have seen no evidence to support the view that he did not sufficiently take into account the cases they were seeking to make. As regards express mention of all the points in his judgments, he was presented with the same difficulty as us when presented with a multitude of points which were essentially the same but were presented in a variety of forms and with varying emphases. However it is clear from the transcripts that he did address individually the cases of each unrepresented litigant.

Most of the unrepresented litigants were concerned that we should in particular know and see evidence of deceitful and dishonourable conduct of various persons between about 1980 and 1988. Contemporaneous documentary material was submitted to support this; references were made to cases of professional breach of duty by member's and managing agents which had been before the courts. Mr Thomas-Everard provided us with copies of the judgment of Judge Payne in the case Allen v Lloyd's and he also referred to the judgment of Cresswell J in Henderson v Merrett, 26 October 1995. Eloquent oral submissions about the way some names had been treated were made by Mr Thomas-Everard and Mr Butler. The relevant question remains however whether such matters provide Names with a defence to the present claims. All the ways in which they might do so have now been exhaustively explored in the 22 months which this litigation has so far taken. It must be accepted by Names that they do not provide them with defences to the present claims and that they must, in so far as they have not already done so, pursue their allegations of liability against those responsible in other actions. Nothing we have said in this judgment precludes them from doing so; the merits or demerits of such claims are not for us to determine (nor is the question whether they are now time-barred).

Many of the unrepresented parties challenged the use of O.14 procedures in the present cases

and referred to the number and length of the hearings which have taken place and the volume of the documentation which has been before the courts concerned. This was understandable and is the reason why, earlier in this judgment, we have explained the nature of the O.14 proceedings which have taken place in this litigation.

The application of Mr Huskinson has been resolved by agreement. The letter we received from Mrs Betty Orme was handed to the solicitors representing her in this Court, Epstein Grower & Michael Freeman. Some of the Warner Cranston Names seek a stay of execution on personal grounds; these Names must make their application in accordance with the Judge's direction.

Mr Thomas-Everard:

This Applicant made the most comprehensive submissions to us and sought to adopt effectively all the points made by others. His proposed grounds of appeal followed those of others, professionally represented. He criticised the use of O.14 proceedings and sought to restrict their scope. He also criticised the treatment of his case in the courts below. He challenged the costs order that had been made against him by Colman J: but this was a matter which was clearly within the discretion of the Judge. He objected that the Society had behaved oppressively towards him and his daughter.

On the liability aspects, he clearly did not accept the correctness of the decisions made in 1996/7. As previously stated, those decisions have established the legal position including the validity of the relevant Bye-Laws and resolutions and, insofar as they show that certain submitted defences are not valid, must be respected. For the reasons given earlier, the 'bad faith' and EEC law points do not disclose arguable defences. On the privity point, had it been relevant, Mr Thomas-Everard would have had difficulty in disassociating himself from the 1996/7 test cases. As regards his point on the correct percentage of acceptances which the Society had had to the Settlement Offer, a receipt of a given percentage of acceptances was not made a condition of the R&R scheme and provides Mr Thomas-Everard with no defence. On the quantum aspects, the points he raised fell within the same ambit as those raised by the represented parties and must receive the same answer. The point which he took about losses which had not been called did not advance his case. Insofar as he sought on grounds of personal hardship to obtain a stay of execution, that was and remains a matter to be dealt with by Master Miller, should he be minded to make an application to him.

The application of Mr Thomas-Everard for leave to appeal must be refused.

Mr F and Mr A Wakefield:

These Applicants took some of the same points as Mr Thomas-Everard. Like him they submitted that clause 5.5 should not be treated as valid. They challenged the Society's reliance upon clause 5.10. They too raised the question of uncollected premiums. They sought to invoke the Data Protection Act; if they had any basis for alleging a breach of any of the Society's obligations under the Act, they did not provide a basis for giving leave to defend in these actions.

Their applications for leave to appeal must be refused.

Mr Vaudrey:

He complained about the procedure which had been adopted in the Commercial Court, the use of O.14, the consideration of his case, and the refusal of an adjournment. In particular he sought to rely upon the 'bad faith' defence and objected to his being treated as privy to the 1996/7 decisions. He was one of those who had not been served with any writ until 1997 and therefore would have had an argument on this point but his application fails because the 'bad faith' point does not give rise to an arguable defence. His claim to a stay of execution on the ground of personal hardship is not a matter for this Court.

His application must be refused.

Mr Butler:

He has particularly challenged the conclusion that there is no arguable defence on liability. He would seek to rely in particular on the 'bad faith' point; however, for the reasons already given, this does not assist him. His point on the 1984 Bye-Law was covered by the previous Court of Appeal decision. Like others, he seeks a stay of execution on personal grounds and, like them, must make that application to the Master as directed by the Judge.

His application for leave to appeal must be refused.

Mrs Strong:

In the course of her written submissions she has raised a large number of points. Like others, she does not accept what was decided in 1996/7. However the relevant points were covered by those

decisions. She cannot now use as a *defence* what occurred in the early 1980s. Nor does it assist her to seek to rely upon such cases as Brown v KMR [1995] 2 Lloyd's 513 in view of clause 5.5 and the decision of the Court of Appeal. Whilst she may have an argument on the privity question, this does not (for the reasons already given) assist her on the critical point of resisting the O.14 judgment. On the question of Quantum, she suggests that in her case there has been manifest error so as to take her case out of clause 5.10. She is suspicious of the figures which have been used in her case and expresses her belief that there must have been some errors, even errors in her favour. But the evidence upon which she relies does not suffice to show that she has a triable defence on the quantum of the claim made against her. If her personal circumstances are such as to justify a stay of execution, that is an argument which she must address to the Master.

Her application for leave to appeal must be refused.

VIII. EG&MF CLIENTS: COSTS APPEAL APPLICATION

The Judge made the usual order for costs against the defendants in the action. It is argued that he should not merely have relied upon the rights of contribution of the defendants among themselves, but should have limited the plaintiffs' order against each individual defendant so that the plaintiffs had to recover a small pro rata proportion from each defendant separately. In such cases the normal order is a single joint and several order against the opposite parties jointly represented. The Judge was entitled to make such an order. The points being argued were points which were advanced to further the cases of all the defendants. The Court of Appeal on the 1997 appeal adopted the same approach after hearing argument. The order which the Judge made was within the discretion open to him and was not wrong in principle.

The application must be refused.

IX. CONCLUSION

All these applications for leave to appeal must be refused.

We have set out our conclusions and the reasons for them more fully than would normally be the case on an application for leave to appeal, particularly one which related to a proposed appeal from an O.14 judgment. The making and outcome of these applications has been of the greatest importance to very many of the Names represented and unrepresented before us. The fact that they have been refused is something which they will find hard to accept. We trust that the explanations which we have given will, when read in conjunction with the judgment of the Court of Appeal last year and the

judgments of Tuckey J since then, go some way towards explaining why they cannot any longer resist the entry of the judgments against them. We also trust that they will understand that the applications have not been refused on any technical ground but because, even if leave had been given, the proposed appeals would have been bound to fail as would have the defences they were seeking to raise in the various actions. Giving them leave to appeal or leave to defend would have served no legitimate purpose.